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No. 84-1277

In The

Supreme Court of the United States

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CAROL DUNCAN, d/b/a TV NEWS CLIPS,
Petitioner,

vs.

PACIFIC AND SOUTHERN COMPANY, INC.,
d/b/a WXIA-TV,
Respondent.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

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PARTIES TO THE PROCEEDING

In the caption of the Petition for Writ of Certiorari, Respondent is incorrectly referred to as "Southern and Pacific Company, Inc." Respondent's correct name is "Pacific and Southern Company, Inc."

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Pacific and Southern Company, Inc., d/b/a WXIA-TV, Respondent, respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit sought by Carol Duncan, d/b/a TV News Clips, and will show this Court that this cause should not be reviewed by this Court pursuant to Rule 17.

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STATEMENT OF THE CASE

The case before the Eleventh Circuit presented straightforward issues of copyright law: had the District Court correctly concluded that the copyrighted news broadcasts of plaintiff WXIA-TV (Respondent here, an Atlanta television broadcaster) were infringed by the defendant Carol Duncan, d/b/a TV News Clips (Petitioner here), who without consent or license regularly videotaped WXIA-TV's newscasts for purely commercial purposes and then sold videocassette copies of as many portions of the newscasts as she could sell, or, alternatively, was Mrs. Duncan correct in contending that her copying was a "fair use" of copyrighted materials and that the First Amendment protected her copying and selling; and, if the District Court correctly found that WXIA-TV's copyrights were infringed, was WXIA-TV entitled to an injunction against future copying, which injunction the District Court declined to enter.

In its unanimous opinion, written by Judge Frank M. Johnson, the Eleventh Circuit agreed with the District Court that Mrs. Duncan's copying was an infringement of copyright and not protected by the "fair use" doctrine or the First Amendment. It also instructed the District Court to enter an injunction against future infringements. The District Court is now considering the appropriate scope of the injunction.

SUMMARY OF ARGUMENT

Properly viewed, this case does not present *any* of the three "Questions Presented" which Petitioner states, and is not in conflict with any decision of this Court or any other court (and indeed, as Petitioner admits, raises issues of first impression). These facts, and the clear correctness of the unanimous Eleventh Circuit decision, render the Petition insubstantial.

Petitioner's first two questions presented are premised upon denial of "reasonable access" to television news reports, and mischaracterize the facts, which reveal that WXIA-TV provides virtually complete access, yet Petitioner provides almost none.

Petitioner's third question presented is similarly non-existent in fact. The question assumes that what WXIA-TV has protected in this case are "future works which are to be destroyed shortly after they are created." In fact, WXIA-TV does not destroy any part of the work.

The legal arguments which Petitioner makes are unsupportable even if her erroneous factual assumptions are shared.

Petitioner makes the novel argument (Question 1) that the First Amendment—which according to decisions of this Court does not guarantee access even to many news sources—should guarantee her "access" to copy for her own profit but without compensation to WXIA-TV secondary reports of news produced at the expense and through the creativity of WXIA-TV. Petitioner's First Amendment argument is made without any analysis whatsoever, and Petitioner does not even advise this Court of the volumes of precedent which her argument contradicts.

Petitioner's second question deals with the "fair use" doctrine, but Petitioner's legal argument seeks a departure from that doctrine rather than an application of it. The four "fair use" factors articulated by Congress (17 U.S.C. §107) and applied with precise attention to fact and to precedent by the Eleventh Circuit (App. A4-13, 744 F.2d at 1494-98) militate strongly in WXIA-TV's favor:

(1) the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes," favors WXIA-TV because Mrs. Duncan's purpose is commercial only and is completely unproductive (see Eleventh Circuit's discussion at App. A8-9, 744 F.2d at 1496);

(2) the second factor, "the nature of the copyrighted work," presents a close question: the "news" nature of WXIA-TV's copyrighted works, which in some cases might give rise to a fair use defense, does not do so in this case because Mrs. Duncan does not disseminate news and because the other three factors strongly favor WXIA-TV (see App. A11-12, 744 F.2d at 1497);

(3) the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," favors WXIA-TV: Mrs. Duncan uses all of each work because she copies all for commercial purposes, then tries to sell as much as possible (see App. A10-11, 744 F.2d at 1497);

(4) the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," also favors WXIA-TV: Mrs. Duncan injures WXIA-TV's potential market for sales of videotapes of news stories and produces actual as well as presumed harm (see App. A9-10, 744 F.2d at 1496-97, and *Sony, infra*, 78 L.Ed.2d at 598).

Petitioner, unable to quarrel with the Eleventh Circuit's application of the "fair use" law, therefore departs from the four statutory factors (which Petitioner mentions only in passing at page 17 of her Petition, footnote 10) and argues for a very different "fair use" rule which, squarely contradicting the statute and decades of consistent precedent, presumptively authorizes "commercial" and "competitive" uses as fair, and brands the statute and the unanimous Eleventh Circuit decision as products of "confusion" (Petition, pp. 15-23).

Finally, Petitioner suggests that the copyright law is being applied to her in an unconstitutional way because it does not in the current case guarantee a public benefit. This argument, too, is unavailing: of course there is a clear public benefit which WXIA-TV provides by broadcasting news for free several times each day; and Congress's law-making in the copyright field is proper even if no public benefit in this case had been derived because Congress created an incentive to produce works which often will benefit the public, and no court has held that the public benefit must be guaranteed in the case of every copyrighted work as a prerequisite to copyright protection.

The sole attractiveness, then, of the Petition lies in its depiction of Petitioner's needed new industry which is threatened with collapse by the decisions in the two lower courts. But this depiction, too, is incorrect: her industry serves no useful function which cannot lawfully be provided by others, but her industry can survive if it is willing to pay license fees for the works which it copies.

This brief will address the Petitioner's departures from fact and from law in approximately the sequence employed in the Petition.

ARGUMENT AND CITATION OF AUTHORITIES

I. The Petitioner's "Questions Presented" Are Based On Facts Not Present Here

A. *The Infringing "Broadcast Monitoring" Industry*

Petitioner's appealing description of an innovative, benevolent, new, growing, and unique "service" industry, euphemistically described as the "broadcast monitoring" industry, is unsound.

The business of the industry is *not monitoring*, but *copying*. "Monitoring" of televised news reports is obviously lawful and obviously does not require copying. "Copying" of *all* of original copyrighted news reports, without license, and for the sole purpose of sale of as many copies of as much of the newscasts as possible, in the complete absence of some productive addition (such as analysis, criticism, or abstraction) to the copyrighted original, is what is at issue in this case.

Petitioner's analogy to the "newspaper clipping service" does not aid her. Because a newspaper is bought, the purchaser may do with it exactly as he wishes: the articles may be "clipped" from it and forwarded to others without raising a hint of a copyright issue because of the obvious absence of copying. Thus a "newspaper clipping service" is strictly legal. The broadcast "monitor," on the other hand, does not purchase a newscast. Instead, the staple raw material of the "industry," the videotape of the newscast, is copied.

Petitioner's case for the valuable service offered by the "monitoring" "industry" overlooks other key facts as well.

First is the fact that the "industry" may operate perfectly lawfully by *obtaining licenses* from the television stations or

networks whose broadcasts are to be copied. The precise importance of this case to the Petitioner's "industry" thus lies in Petitioner's effort to save the industry the need to pay anything at all for its *entire product*, even though the product is created solely by the skill, energy, resourcefulness, and expense of others.

Mrs. Duncan nowhere tells this Court, nor did she tell the lower courts, why her profitable business, indeed the entire "industry," cannot or ought not pay anything for the cost of the "goods" (videotapes) which it sells. Thus, while the newspaper clipping service pays the asking price for its goods, the "broadcast monitor" wishes to appropriate the goods (from the producer and owner, the television station) free of charge—and yet wishes to charge its own customers for the same goods which it denies that it should pay for!

Indeed, the record in this case clearly reveals that Mrs. Duncan never even tried to get a license from any of the four Atlanta newscasters whose broadcasts she routinely copies. (Tr. 101-02.)

Second is the overlooked fact that if a demand indeed exists for such "services," the demand may be met lawfully in at least three ways even absent a responsible (*i.e.*, licensed) "broadcast monitor." This Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 104 S.Ct. 774, 78 L.Ed.2d 574, 52 U.S.L.W. 4090 (1984), *reh. denied*, 104 S.Ct. 1619, 80 L.Ed.2d 148 (1984) (hereinafter "*Sony*"), probably means that one of Mrs. Duncan's "clients" desiring to have a copy of a televised news report about him, her, or it could lawfully make a copy, solely for internal use, directly off the air. If the client learned of such a news report only after it aired, it could purchase a copy from the television station itself.[1] Mrs.

Duncan's industry may be more convenient than these two alternatives (only because she routinely copies all local news broadcasts) but Congress far-sightedly provided for even this convenience to be lawfully provided by a library or archive.[2]

In sum, then, the Petitioner's "industry" seeks in this case a windfall which, at the expense of television producers, will spare the broadcast copiers the need to pay the ordinary cost of doing business; and the windfall is not only unnecessary to the industry which could obtain licenses to conduct business lawfully, but the industry is unnecessary itself given the existing legal framework and the farsighted congressional scheme.

B. *WXIA-TV's Policies Concerning Retention and Sale of Videotapes of Its News Reports.*

Petitioner's treatment of WXIA-TV's practices is also unsound.

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[1] WXIA-TV is happy to sell videotapes of such reports to anyone, as will be discussed.

[2] Pursuant to Section 108 of the Copyright Act, libraries and archives may copy broadcasts off-the-air, *provided* the copies made are open to the public and researchers, are not used for any commercial purpose, are confined to one copy of each broadcast, and include a notice of copyright. It is interesting to note that Congress's four carefully constructed conditions with which libraries and archives must comply are *all* violated by Petitioner: her videotapes are not open to anyone, but must be bought; her purposes are only commercial; she sells as many copies as she can; and she does not include a notice of copyright. Of course it is not plausible that Congress, which placed these strict conditions on libraries and archives which serve the public, intended to allow Petitioner and her industry to violate all of these restrictions for purely commercial purposes under the guise of "fair use," the section of the 1976 Copyright Act immediately preceding the "archive" exemption.

As Petitioner admits (Petition, p. 6), WXIA-TV retains the scripts and complete audiotapes for all of its newscasts. Although Petitioner goes no further, this Court should know that the scripts are retained for a year and audiotapes are retained indefinitely. (Tr. - 30, 35, 36, 42, 68, 69.)

Petitioner completely fails to mention the important undisputed fact that all of the videotapes of the individual news stories themselves (which are taped before broadcast or taped live outside the studio) are routinely retained for five to seven years by WXIA-TV. (See App. A2, A24, 744 F.2d at 1493, 572 F. Supp. at 1191.)

Therefore, although it is true that WXIA-TV usually erases after one week the master videotape of the entire newscast (this is the "fixation" videotape which is recorded simultaneously with the live broadcast), the only portions of its newscasts which WXIA-TV cannot reproduce with precision after that week are the "visual element of segments of the show broadcast live from within the studio." (App. A2, 744 F.2d at 1493.)

Certainly WXIA-TV's retention, then, compares more than favorably with that of Mrs. Duncan, who retains nothing for longer than four weeks. (Tr. 106-07.)

Thus Petitioner's third "Question Presented" (Petition, p. i) is predicated on a mischaracterization of fact: "copyright protection for future works which are to be destroyed shortly after they are created" is not an issue, since erasure of the videotape does not and cannot "destroy" any of the copyrighted works. Only one embodiment of the work is destroyed, and the other embodiments of virtually all elements of the work (the script, the audiotape, and the individual news stories) remain.

The access provided by WXIA-TV to its newscasts is extraordinarily broad. First, WXIA-TV produces its newscasts at a cost borne by it alone, and broadcasts the newscasts free of charge over the air to anyone in and well beyond the Atlanta metropolitan area who desires to watch and listen. This is broad, free primary access, and WXIA-TV broadly permits secondary access as well. As stated by the Eleventh Circuit: "WXIA has always honored requests to view tapes and usually allows persons to buy the tapes they want." (App. A2, 744 F.2d at 1493.)[3]

Thus, WXIA-TV's access policies—providing almost total access—are more than reasonable, and vastly broader than Petitioner's, and the Petitioner's first two "Questions Presented" (Petition, p. i), which are premised upon deprivation of "reasonable access" to news broadcasts, are not in the case.

Petitioner has made no record that other television stations are less generous than WXIA-TV in providing access to their newscasts, or are less energetic than WXIA-TV in retaining tapes and scripts. This failure of proof alone makes the present record particularly inappropriate for certiorari.[4]

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[3] The Eleventh Circuit explained the sole exceptions to this broad access policy in a footnote (number 1): "The tapes cost one hundred dollars. WXIA will not sell tapes to political candidates because the sale could appear to be an endorsement or other show of support for the candidate. Out of a similar concern over favoritism, the station asks for a subpoena before selling a tape that will be used in litigation."

[4] Regrettably, certain unjustifiable remarks in the Petition of a factual nature must be briefly touched upon.

Petitioner repeatedly states with emphasis that WXIA-TV does not customarily "register" its claim of copyright. (For example, the statement appears four different times on pages 6 and 7 of the Petition.) Although the old copyright law made registration important to the existence of a copyright, the fact is of no significance under the 1976

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II. Petitioner's Legal "Questions Presented" Are Thus In Fact Not Presented.

Petitioner's request that this Court consider denial of, or a right to, "reasonable access" to copyrighted news broadcasts (her "Questions Presented," numbers 1 and 2) cannot be satisfied by certiorari in this case, since WXIA-TV provides near-total access, and far more access than Petitioner provides.

Her request that this Court consider copyright protection for "future works which are to be destroyed shortly after they are created" (Petitioner's question 3) is similarly inapplicable to this record: the work is never destroyed, and except for a small number of live in-studio visual elements, no embodiment of the work is destroyed by WXIA-TV.

III. The Eleventh Circuit's Decision in this Case of First Impression Is Not in Conflict with Any Precedent.

As Petitioner acknowledges, this is a case of first impression. The Eleventh Circuit's decision not only is not in conflict with any precedent, but was mandated by earlier decisions of

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copyright law, which omitted the registration prerequisite to copyright protection, and requires registration only as a predicate to a legal action to enforce the copyright after the infringement. 17 U.S.C. §411(a). Regular registration of copyrighted newscasts, then, would be foolish as well as costly. Here, both the Copyright Office and the two lower courts accepted WXIA-TV's registration of the copyrighted works involved in this case (App. A23-26, 572 F. Supp. at 1190-91; App. A4-5, 744 F.2d at 1494), and News Clips chooses not to make "registration" an issue presented in its Petition for this Court's review; and the repeated emphatic remarks about non-registration, which seek to conjure up distrust toward Respondent and the lower courts founded in the fond memory of the repealed law, are entirely out of place.

Finally, Petitioner falsely implies, contrary to the express terms of the Copyright Act and the two holdings below, that WXIA-TV misled the Copyright Office by submitting a claim of copyright on a work which

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this Court and the lower federal courts, most recently the *Sony* decision of this Court.

Precedent establishes several fundamental principles which made the Eleventh Circuit's decision inevitable.

The first principle is that total verbatim copying is virtually never found to be a fair use. *See Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *affirmed by an equally divided court*, 356 U.S. 43, 78 S.Ct. 667, 2 L.Ed.2d 583 (1958); *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967); *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied* 439 U.S. 1132, 99 S.Ct. 1054, 59 L.Ed.2d 94 (1979); *Quinto v. Legal Times of Washington, Inc.*, 506 F.Supp. 554 (D.D.C. 1981); 3 NIMMER ON COPYRIGHT (1984) Sections 13.05 [A][3], 13.05 [D][1].

So far as Respondent is aware, in only two cases has such substantial copying been held to be a fair use. In the first, *Williams & Wilkins Company v. United States*, 487 F.2d 1345

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had not been properly "fixed" in violation of 17 U.S.C. §101. This misstatement (the "Copyright Office had no way of knowing . . .", etc.) appears at page 8 of the Petition, and is repeated in substance at pages 24-25. Of course the copyright in the entire news report was "fixed" when the master videotape was created, and the fixation need only exist for a period of "more than transitory duration" (17 U.S.C. §§101, 102), not forever. And nowhere is it required that the "registration" copy deposited with the Copyright Office be the "fixation" copy itself. Here again, then, the Copyright Office and both lower courts agree that WXIA-TV properly "fixed" its broadcasts to achieve copyright protection, and, later, properly deposited a copy of the work in order to become entitled to judicial remedies for enforcement. (See App. A4-5, 744 F.2d at 1494; All, 744 F.2d at 1497; and A24-26, 572 F. Supp. at 1191.) And here again, Petitioner does not directly challenge these portions of the holdings, preferring to misstate the law and the holdings to her advantage.

(Ct. Cl. 1973), *affirmed by an equally divided court*, 420 U.S. 376, 95 S.Ct. 1344, 43 L.Ed.2d 264 (1975), the Court of Claims held, in a 4-3 decision that was affirmed by an equally divided court, that non-profit institutions that supplied from their libraries strictly limited numbers of copies of medical research articles contributed by unpaid authors, which articles were often unavailable elsewhere to medical researchers, for use in their own scientific work, were engaged in a fair use of the articles. And, of course, in *Sony* this Court found that non-commercial in-home videotaping of television programs for personal use is a fair use. None of the factors which supported findings of fair use in those cases is present in this case.

The second principle is that where, as here, the use is purely commercial, it almost certainly is not fair. *See MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *Association of American Medical Colleges v. Mikaelian*, 571 F.Supp. 144 (E.D.Pa. 1983), *affirmed* 734 F.2d 3 (3d Cir. 1984), 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][1]. As this Court pointed out in *Sony*, a commercial use is *presumptively* unfair and the likelihood of harm to the copyright owner may be presumed. 78 L.Ed.2d at 596-98. No societal benefit is facilitated by Petitioner to cause that presumption to be overcome.

Closely associated with the second principle is the third. Petitioner's commercial use of Respondent's work in its entirety decreases the potential market Respondent would have for sales of its own news clips. This damage to Respondent's potential market precludes fair use. 17 U.S.C. §107(4); *Pacific and Southern Company, Inc. v. Duncan*, 744 F.2d 1490, 1496-97; *Sony, supra*, 78 L.Ed. 2d at 596-98; 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][4].

Until *Sony* the fourth principle often was found sufficient by itself to preclude a finding of fair use. That principle is that unproductive or uncreative uses are unfair. *See Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1981); *Dow Jones & Co., Inc. v. Board of Trade*, 546 F.Supp. 113 (S.D.N.Y. 1982); 3 NIMMER ON COPYRIGHT (1984) Section 13.05 [A][1]. Although this Court in *Sony* rejected "productive use" as an absolute prerequisite to fair use, it found that principle "helpful in calibrating the balance." *Sony*, 78 L.Ed. 2d at 600, n. 40. Petitioner's use is neither productive nor creative, tipping the balance in the Respondent's favor.

Fifth is the principle that, although news is not copyrightable, expression of the news is. *See Wainwright Securities, Inc. v. Wall Street Transcript Corporation*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759 (1978); *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (2d Cir. 1980); *New Boston Television, Inc. v. Entertainment Sports Programming Network*, CCH Copyright Law Decisions ¶ 25,293 (D.Mass. 1981); *Quinto v. Legal Times of Washington, Inc., supra*; *Roy Export Establishment of Vaduz, Liechtenstein, Black, Inc. v. Columbia Broadcasting System, Inc.*, 503 F.Supp. 1137 (S.D.N.Y. 1980), *affirmed*, 672 F.2d 1095 (2d Cir. 1982), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982). Cf. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195 (2d Cir. 1983), *cert. granted*, 104 S.Ct. 2655, 81 L.Ed.2d 362, 52 U.S.L.W. 3860 (1984).[5] That

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[5] The grant of certiorari by this Court in *Harper & Row* furnishes no reason to grant the Writ in this case or to hold this case pending this Court's *Harper & Row* ruling. *Harper & Row*, unlike this case, involves questions of fair use which are close and weighty, and the issues in *Harper & Row* are most unlike those in this case. The alleged infringer in *Harper & Row*, Nation Enterprises, in fact disseminates information

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principle works against Petitioner, as well. Respondent does not seek copyright protection for news, only for its expression of the news. Petitioner does not seek to disseminate news, only to sell Respondent's expression of it.

Taken together, the foregoing principles compel the conclusion that Petitioner's use is not fair and that the Court of Appeals was bound by precedent so to find. Each such principle, taken singly, would have likely been fatal to Petitioner's "fair use" argument; but when Petitioner's total verbatim copying is considered together with her total commercial purpose, her appropriation of WXIA-TV's potential market, the absence of any value she adds to WXIA-TV's original news reports, and her taking of WXIA-TV's original expression of the news, Petitioner's position is worse than insubstantial, and the Eleventh Circuit's unanimous ruling could not have been different.

IV. Petitioner's Discussion of Legal Issues is Seriously Flawed.

A. *The free speech non-issue.*

Petitioner postulates a right under the First Amendment "to receive information and ideas." Petition at 10. While it is true that such a right has been found under some circumstances, it

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to a broad public, an activity in which Petitioner here is not engaged. And as the Eleventh Circuit in its decision in the present case pointed out, the *Harper & Row* facts involve a use of "material from the book that was for the most part not copyrightable at all. Furthermore, the public interest in the average news story is far less than the interest in presidential memoirs." (App. A12, 744 F.2d at 1497, n. 12.) Thus the Second Circuit's decision in *Harper & Row* does not aid Petitioner; and should this Court reverse in *Harper & Row*, Respondent's position would be even further strengthened.

has no bearing whatsoever on this case. WXIA-TV's provision of access[6] alone defeats Petitioner's attempt to benefit from any right of access.

In addition, there simply does not exist a general right of access by the public, by Petitioner, or by Respondent, even to every primary source of information, *i.e.*, the event or information itself. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585, 100 S.Ct. 2814, 65 L.Ed.2d 973, 995 (1980); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), *reh. denied*, 382 U.S. 873, 86 S.Ct. 17, 15 L.Ed.2d 114 (1965); *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966), *reh. denied*, 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed.2d 559 (1967); *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). Only in certain circumstances and to certain historically public primary happenings has a right of access been recognized. *See Richmond Newspapers, Inc. v. Virginia, supra*; *Gannett Company, Inc. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); *Press-Enterprise Company v. Superior Court*, 104 S.Ct. 819, 78 L.Ed.2d 629, 52 U.S.L.W. 4113 (1984). If there were a complete right of access, there would obviously be no need for legislation such as the Freedom of Information Act, 5 U.S.C. §552, open records laws, or "sunshine" laws to guarantee access.

If there is no right of access to many primary sources of

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[6] It should be remembered that Respondent honors and fosters the public's right to receive information and ideas by broadcasting for free to the public and providing other access as well. See discussion, *supra*, at 9.

news, there certainly is no right of access to secondary sources, such as Respondent's news programs.

The alleged "right of a citizen to use the services of a broadcast monitor," Petition at 11, is also not an issue in this case. Rather, the issue is whether the broadcast monitor itself is exempt from paying a license fee for the copyrighted works which it copies and sells.

As ably put by the Eleventh Circuit in dealing correctly with Petitioner's First Amendment "access" argument:

> "Because the public already has access to this material and TV News Clips does not offer any access that WXIA could not provide, TV New Clips' activities fall well beyond whatever protections might be available to further this public access interest. The First Amendment does not conflict with WXIA's effort to enforce its copyright in this case." (App. A14, 744 F.2d at 1498.)

B. *The Constitutional copyright non-issue.*

It is true, as Petitioner states, that among the purposes of copyright are the desires to promote learning and benefit the public. Congress has the responsibility to decide how those goals are to be achieved, however, *see, e.g., Sony, supra*, 78 L.Ed.2d at 584, and to that end it has chosen, as the Court of Appeals correctly observed, to create an incentive to offer the public benefits by providing access, not to create a command to do so. (App. A14-15, 744 F.2d at 1498-99.) The Court of Appeals also correctly pointed out that the goals of the Copyright Clause are achieved with respect to Respondent's work, by broadcast, by access to the work in its entirety for seven days, and by essentially permanent access to the work in virtually its entirety. (App. A15, 744 F.2d at 1499.)

Petitioner raises the spectre of "perpetual" copyright, but her concern is purely theoretical. Petitioner has decided that Respondent's works are of no commercial value to her after four weeks from their broadcast, and destroys her copies at that time. Thus, "perpetual" copyright protection, if a concern, would *not* be remedied by Petitioner. It could, however, be remedied by a true "fair use" and, by Congress's leave, by libraries and archives. This is not, therefore, an appropriate case in which to address the non-issue of "perpetual" protection.[7]

C. *The "fair use" copyright non-issue.*

Whether, as is claimed by Petitioner, the doctrine of fair use permitted a small number of competitive uses a century ago has no relevance to today's Copyright Act and the present concept of fair use. As Petitioner admits, the copyright laws have prohibited unauthorized copying since 1909. *And see Sony, supra*, 78 L.Ed.2d at 605 (Blackmun, J., dissenting). Commercial uses have consistently been held to be unfair. *See* citations, *supra*, at 12.

In *Sony*, for example, this Court decided that commercial uses are *presumptively* unfair. 78 L.Ed.2d at 596-98. And Section 107 of the Act reinforces that view. The very first factor that must be considered in a fair use analysis is the purpose and the character of the use, "including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1).

That Petitioner's use is commercial bears on the fourth statutory fair use factor, the effect of the use upon the potential

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[7] "Perpetual" copyright is an imaginary concern for another reason: the District Court, as this brief is printed, has not yet entered an injunction. If that injunction protects the copyrighted broadcasts for longer than the appropriate limited duration granted by Congress, Petitioner will be free to appeal.

market or value of the copyrighted work, as well. If the infringing use is for commercial gain the likelihood of harm to the copyright holder "may be presumed." *Sony*, 78 L.Ed.2d at 598. Of course, in this case harm was proved. (App. A9-10, 744 F.2d at 1496-97.)

Petitioner would have this Court adopt a new *per se* test which overrides the fair use analysis and replaces the language of the "fair use" section, in which test the copyright owner would be required to show that the infringing use creates a disincentive to produce which more than offsets the benefit inherent in allowing more viewers to see television programs. Petition at 16. That has never been a fair use test, however, and it would be at odds with both Section 107 and *Sony*, in which this Court simply applied the statutory factors. The Court's only mention in *Sony* of an incentive to create was to observe that a noncommercial use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the "author's incentive to create." 78 L.Ed.2d at 597.

That consideration is, of course, remote from this case because Petitioner's use is commercial and the harmful effect upon the potential market for Respondent's work has been demonstrated. And Petitioner does not even provide the claimed benefit of allowing more viewers to see Respondent's programs. She merely permits some viewers to obtain souvenirs of small portions of the programs.

Thus, "confusion" about the "fair use" doctrine surfaces, not in the decisions of the lower courts, but only in Petitioner's argument. Petitioner's invitation to reject Congress's "fair use" provision to enable her to take, for commercial purposes, the entirety of WXIA-TV's costly product, must be rejected.

CONCLUSION

The reasons for denying the Writ of Certiorari sought by Petitioner are numerous and persuasive.

There is no conflict in the law, and indeed the issue of first impression presented was decided correctly as compelled by this Court's *Sony* ruling, a huge body of case law, and the 1976 Copyright Act. The only four judges ever to apply the statutory "fair use" formula to commercial copying of televised news broadcasts have agreed that Petitioner Duncan is in no sense a "fair user."

Petitioner's "industry" has shown no need that it be spared the requirement of paying a license fee for its sole product.

Petitioner has sought no license, and has not shown that the television industry in general or WXIA-TV in particular (which was not asked to grant Petitioner a license) denies licenses.

Petitioner's service, if needed, may be lawfully provided in several ways even if her "industry" perishes.

The facts of this case contradict the asserted factual bases of the questions which Petitioner seeks to present.

The legal questions raised in Petitioner's argument are both theoretical and insubstantial.

We submit that the Writ should be denied.

Respectfully submitted,

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